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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 94

CELESTINO IRIARTE, JR., ET AL.,
Petitioners,

vs.

THE UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT AND BRIEF IN SUPPORT THEREOF.

JOSE A. POVENTUD,
F. FERNANDEZ CUYAR,
Counsel for Petitioners.

CELESTINO IRIARTE, JR.,
H. GONZALEZ BLANES,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 866

CELESTINO IRIARTE, JR., ET AL.,
Petitioners,

vs.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS, FIRST CIRCUIT

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Celestino Iriarte, Jr. and Eduardo Iriarte, pray a writ of certiorari to review the judgment of the Circuit Court of Appeals for the First Circuit, entered March 11, 1948, affirming the judgment of the District Court of the United States for Puerto Rico rendered March 14, 1947.

Statement of the Case

Petitioners, the Iriarte family, were vested with absolute fee simple title to, and were possessed of, a certain tract of land located in the municipality of Guaynabo, ward of

Pueblo Viejo, near San Juan, Puerto Rico. Its description shows that, once, there was a landing pier there, for loading and unloading materials, fronting the San Juan bay (R. 14 mid.).

The United States of America, on May 31, 1941, lodged in the lower Court a declaration of taking (R. 1-8) and a petition for condemnation (R. 8-15) of a portion comprising 33.297 acres more or less, referred to as "Tract 1, Parcel 2" (R. 3), which was to be segregated from the principal or larger property above outlined (R. 14). Condemnor alleged that the land or acreage taken was "necessary *adequately to provide for storage and terminal facilities* at an Army base" *for use in connection with the establishment of a terminal and dock* to serve the Puerto Rican General Depot (R. 2 mid.).

The Government admits that the 33.297 acre-tract is a parcel of land located in the ward of Pueblo Viejo, municipality of Guaynabo, *bounded on the North by lands of Marcos Torres Canejas,* the People of Puerto Rico *and the San Juan Harbor;* on the East and South by the principal estate from which it was segregated, owned by appellants Celestino and Eduardo Iriarte, *and on the West by Insular Road No. 25* (R. 9).

As will hereafter appear, *the tract condemned is a waterfront property most suitable and available for urbanization purposes as well as for industrial development as a waterfront* site.

At the time of the taking, the lands were well adapted to, with present capacity for, commercial or industrial development or use as coastal property in a community needful of dock space for which there was increasing demand. In fact, all witnesses for respondent knew (R. 317 mid.) that the condemnation was for the purpose of building a dock or pier, though they did not give any consideration to the site for such purpose. The lower court

itself, during the first trial, alluded to an obvious fact: that the better proof showing adaptability of the land taken for dock purposes "is that the Army has built it up there" (R. 119 near bot.). On retrial, that court also found that the Iriarte properties "*are suited for the purpose of* a dock or terminal site" (Supp. R. 22 mid.).

The surrounding facilities of the site in suit, at its taking by the Government on May 31, 1941, were ideal. They included public telephone and electric power services as well as water supply; a church and a public school within walking distance; a ferry system from Cataño to San Juan at the low rate of 10 cents; bus facilities to San Juan, Rio Piedras and Santurce, and practically in all directions within the metropolitan district; and also easy access through Insular Road No. 25 to the main road, which is conveniently situated for transportation of goods to all northern and eastern sections of the Island, without need of going to San Juan, etc. (R. 232, 291 mid., 117-118). Adjacent to the lands involved there is an urbanization development with approximately 200 residences, according to Canejas' testimony (R. 118). Canejas, for petitioner, also added that his own home was opposite to Iriartes' (R. 103 bot.). Bertrán assured that both residential houses "are the best type" (R. 246 top). Even Mr. Chapman, a condemnor's witness, regarding Iriarte's residence said that it was there, surrounded by important business enterprises, like Rum Brugal Distillery and the Puerto Rico Cement Corporation (R. 43, 45). The record further shows that the Navy had acquired neighboring lands for residential purposes (R. 114 bot.).

The condemnor deposited in court only $7,311.60 as its estimated compensation for defendants (R. 8 top, 16 bot.); and upon motion of the Government (R. 16-18), the trial court entered, May 31, 1941, judgment on the declaration

of taking and ordered surrender of possession by the landowners (R. 18-21).

Thereupon, petitioners herein, by their amended answer to the petition and declaration of taking, contested respondent's estimated, arbitrary valuation of their lands. A trial by jury was demanded as provided by Acts of Congress and petitioners prayed for judgment awarding them just compensation in the sum of $200,430 for the 33.297 acres aforesaid (R. 25-26). At the trial, petitioners renewed and argued their request for a jury trial, which was denied by the court below (R. 27 bot., 31 top).

On March 20, 1945, the district court entered a judgment fixing the value of the expropriated tract in the sum of $33,297 (R. 311-314).

On appeal, the Court below, after ruling on the Government's right to condemn herein without trial by jury, and surmising that the district court's award was partly based upon the Government policy of free improvement of harbors, reversed said judgment of March 20, 1945, which allowed $33,297 as compensation in this case, and remanded it "for further proceedings not inconsistent" with its opinion. *Iriarte* v. *United States* (Aug. 14, 1946), 157 F. 2d 106, 111; 167 A. L. R. 494.

As the aforesaid award of compensation [1] was vacated or reversed by the Circuit Court of Appeals, an adjudication as to valuation became necessary for the termination of the proceeding, thus providing a final judgment from

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[1] This determination by an intermediate appellate court was not, of course, a final reviewable judgment. *Hazeline* v. *Central Nat. Bank*, 46 L. ed. 117, 118. The effect of such interlocutory reversal and remand was to put at large the principal matter in controversy, by requiring retrial leading to a new judgment (March 14, 1947), on, at least, the issue of compensation. See *Washington etc. Co.* v. *Sup. Ct.*, 61 L. ed. 703, 705, col. 2 bot., citing among other cases, *United States* v. *Beatty*, 58 L. ed. 686, 687, col 2 mid; and see also *Coe* v. *Armour Fertilizer Works*, 59 L. ed. 1027.

which a possible complete review of the whole case may be allowed. *Catlin* v. *United States,* 89 L. Ed. 912, 921.

Therefore, the parties hereto entered into a *stipulation* for submission of the case on retrial upon the printed transcript of the record on the first review of the case. It was also agreed that the respective parties, at the retrial of the cause, might file short memoranda of any additional authorities; and in order to save the points in the event of a second review, defendants resubmitted to the court below for decision as fundamental questions: (a) the lack of authority to take; (b) and the right to trial by jury (Supp. R., pp. 20-21).

On February 27, 1947, an "order" was entered wherein the district court concluded, in substance, that upon rendering its former judgment of March 20, 1945 (R. 311-314), fixing the value of defendants' property in the sum of $33,297.00, it "did not give proper weight to the testimony of Mr. Robert Prann as to a sale of property which he owned near the Iriarte property", and that it "also failed to give proper consideration to the testimony of Mr. Canejas who testified that he had sold several lots located near the Iriarte property at about the time the condemnation proceedings in this case were instituted", etc. (Supp. R., pp. 21-22). The court below then entered judgment, 14 March 1947, in the amount of $45,000, as its estimated market value of the Iriarte lands (Supp. R., pp. 23-26).

This judgment was affirmed by the Circuit Court of Appeals on March 11, 1948. *United States* v. *Iriarte, et al.,* 166 F. (2d) 800.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States,

as amended by the Act of February 13, 1925, C. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered March 11, 1948 (R. 40). The time within which to apply for a writ of certiorari to this Court shall expire June 11, 1948.

Questions Presented

The primary question involves the fundamental right of petitioners herein to a trial by jury on the *fact issue* of compensation. A jury trial was clearly and expressly requested by petitioners in the courts below (R. 26) and was denied (R. 31), whereupon an exception was saved and allowed (R. 31). Such trial by jury is guaranteed to petitioners by positive Federal statutes (28 U. S. C. A., Sec. 770; 48 U. S. C. A., Sec. 863). The denial by the courts below of such fundamental right is, not only contrary to express Congressional enactments, but in open disregard of apposite decisions of this Court.

A second and equally important question here presented relates to the lack of jurisdiction of the courts below, based on the absence of Congressional authority for the attempted taking in this case. The declaration of taking explicitly averred that the desired lands were necessary "for use in connection with the establishment of a terminal and dock to serve the Puerto Rican General Depot" (R. 2). The statute invoked by condemnor (Act of August 18, 1890, as amended July 2, 1917, and April 11, 1918, 50 U. S. C. A., Sec. 171) authorizes the Secretary of War to condemn any land "needed for the site, location, construction or prosecution of work for *foritifications, coast defenses, military training camps. . . .*" The power of eminent domain must be exercised in strict compliance with the statute. An authorization to condemn lands "for fortifications, coast defenses, and military training camps" can-

not be extended by judicial interpretation to cover a taking for a terminal and dock to serve a general depot. The taking of private property for public uses is in derogation of common right, and the authority to do so must be clearly and particularly expressed.

Reasons for Granting the Writ

This case presents two important questions of Federal law of very wide general interest, especially to the people of Puerto Rico. A fundamental right has been denied,—the right to a trial by jury on the fact-issue of compensation. All American citizens of Puerto Rico are entitled to such a right by virtue of positive Federal statutory enactment, and such statute should not be lightly disregarded or set aside on the basis of supposed deference to the so-called conformity rule. The matter is purely a Federal question, and the courts below decided it in a way palpably in conflict with applicable decisions of this Court. See *Chappell* v. *United States*, 160 U. S. 499, 40 L. Ed. 510. Further, it is respectfully submitted that the question as to the extent and scope of conformity with local practice, in Federal condemnation cases, must be definitely settled by this Court to the end that the concept, as now generally applied in this Island, may be harmonized with the uniformly prevalent rule that conformity must give way whenever to adopt the local practice would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress. This Court has held that the direction in the act of 1888, Chap. 728, Sec. 2, that "such proceedings shall conform, 'as near as may be', to those 'in the Courts of record of the State', is not to be construed as creating an exception to the general rule of trial by an ordinary jury in a court of record". *Chappell* v. *United States*, *supra*.

The further question presented, as to the lack of authority for the taking, is indeed of substance and gravity. This Court has recently indicated that if condemnation is not for a purpose *manifestly* authorized by law, the lack of power to take renders the expropriation illegal and any compensation awarded cannot be the just compensation guaranteed by the Fifth Amendment. *Catlin* v. *United States*, 324, U. S. 229, 89 L. Ed. 911. In this case, lands were taken for the construction of a dock to serve a general depot, under a statute which only authorizes condemnation for fortifications, coast defenses or training camps. The lower courts' approval of such plain departure from the statutory authorization poses, under the present circumstances, a substantial constitutional query which should properly be looked into fully by this Court.

WHEREFORE, it is respectfully requested that this petition for a Writ of Certiorari be granted.

JOSE A. POVENTUD,
F. FERNANDEZ CUYAR,
Attorneys for Petitioners.
By F. FERNANDEZ CUYAR.

CELESTINO IRIARTE, JR.,
H. GONZALEZ BLANES,
Of Counsel.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 866

CELESTINO IRIARTE, JR., ET AL.,
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Respondent

BRIEF IN SUPPORT OF THE PETITION

Opinions Below

The original opinion and judgment of the Federal District Court will be found at pages 311-318 of the record. The order denying rehearing appears at page 330 of said record. Another opinion of the District Court, rendered upon re-submission of the case, appears at pages 21-26 of the supplementary printed transcript of record.

The opinions of the Circuit Court of Appeals are reported in 157 F. (2d) 105, and 166 F. (2d) 800.

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, C. 229, 43 Stat. 938.

The final judgment of the Circuit Court of Appeals was entered March 11, 1948.

Statement of the Case

A statement of the case is in the Petition (*ante*, pp. 1-5).

Specification of Errors to Be Urged

These are indicated under the heading "Questions Presented", in the Petition (*ante*, pp. 6-7).

Argument

Point I

Petitioners herein, condemnees in the trial court, were clearly entitled to a jury trial on the fact issue of compensation. Denial of such right by the courts below was an unwarranted violation of a Federal statute, and a substantial departure from the accepted and usual course of proper judicial proceedings.

A. Right to trial by jury.

Petitioners contend that they were entitled to the fundamental right to a trial by jury on the fact-issue of compensation, as demanded in their answer (R. 26). The request was denied below (R. 31 top). And the Circuit Court of Appeals stated that a *Federal statute requiring conformity "as near as may be"* with local practice and proceedings, 40 U. S. C. A. § 258, being specific and the latest expression of legislative will, *supersedes an earlier Federal act*, which it deemed conflicting, *requiring trial of issues of fact* in Federal district courts *by a jury*, except only in cases in equity, in admiralty and in certain instances in bankruptcy (28 U. S. C. A., § 770, p. 389). *Beatty* v. *United States*, 203 F. 620, 621, 622, and *United States* v. *Hess*, 71 F. (2d) 78, 79, are cited by the appellate court (Supp. R.,

p. 12; *Iriarte* v. *United States,* 157 F. (2d) 105, 108, col. 2 mid.).

The ruling excluding a jury trial in this case seems patently untenable and stands in conflict with applicable decisions of this Court.

Beatty v. *United States,* 203 Fed. Rep. 620, 621, *supra,* on the point of statutory repeal by implication, is evidently wrong, as will be seen later from higher and more authoritative decisions of this Court; and as to the question of jury trial in Federal condemnation cases, the *Beatty* case, after holding that a condemnation proceeding is a suit at common law, even went further than necessary in upholding the right to a jury trial, as it granted it exclusively in view of the *7th Amendment* to the Constitution. *Beatty* v. *United States,* 203 Fed. Rep. 620, 626, 627. The other case cited by the Court of Appeals, *United States* v. *Hess,* 71 F. (2d) 78, 79, simply states that a provision that in condemnation under Federal Flood Control Act court should appoint commissioners whose award when confirmed by such court shall be final, establishes adequate procedure. It will be observed that the mode of trial by commissioners was there provided *by another act of Congress,* not by State law or procedure.

It would not be amiss to recall that the provisions of the *Revised Statutes* from which *Section 770* (28 U. S. C. A., p. 398) was derived, *were not by implication repealed by the "as near as may be" general rule of conformance* to the practice, pleadings and forms of procedure existing in local or State courts. The conformity rule solely purports to provide a general regulation of practice and procedure in Federal courts *in the absence of any express congressional enactment upon the subject.* It cannot affect previous acts of Congress expressly requiring, as does *Section 770, supra* a particular mode of trial in any given case or class

of cases. *Wear* v. *Mayer,* 6 Fed. Rep. 650, mid.; *Sulzer* v. *Watson,* 39 Fed. Rep. 415 top.

Hills & Co. v. *Hoover,* 55 L. Ed. 485, 488, regarding the conformity "as near as may be to the State practice" enjoined upon Federal courts by some acts of Congress, held that it was not thereby intended to require adoption of the State practice where it would be inconsistent with the terms or defeat the purposes of Congressional legislation. *F. Carrera & Hermano* v. *Font, Gamundi & Co.* (C. C. A. 1st), 70 F. (2d) 999, syll. 2, p. 1001 col. 2 mid., states that the "Conformity Act does not require that Federal courts conform to practice in insular courts of Puerto Rico when contrary to Federal statutes."

Chappell v. *United States,* 40 L. Ed. at pp. 514, 515, 160 U. S. 499, appears to be the only decision handed down by this Court on the right of trial by jury in condemnation cases in the Federal courts. It was there held that *a proceeding for the taking of lands for public uses is in substance and effect an action at law, which should be tried by an ordinary jury,* notwithstanding State statutes provide other remedies.[2] In the *Chappell* case, 40 L. Ed. at

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[2] *Chappell* v. *United States,* 40 L. ed., at pp. 514 col. 2 bot. to 515, holds:

"The direction, in the act of Congress, that the practice, pleadings, forms and modes of proceeding, in cases arising under it, 'shall conform, *as near as may be,* to the practice, pleadings, forms and proceedings existing at the time in like causes in the courts of record of the state', *must, as was said by this court* in analogous case, following the decisions under the corresponding provision of U. S. Rev. Stat. § 914, . . . *give way whenever to adopt the state practice would be inconsistent with the terms, defeat the purpose, or impair the effect, of any legislation of Congress.*

". . . The proceedings was conducted in substantial accordance with the provisions of the statute of Maryland upon the same subject, *except so far as controlled* by the act of Congress under which it was instituted, *or by other laws of the United States.*

"The proceeding instituted and concluded in a court of the United States *was, in substance and effect, an action at law* (cases). The general rule, as expressed in the revised Statutes of the United States,

p. 515, col. 1 top, this Court cites *Luxton* v. *North River Bridge Co.*, 37 L. Ed. 194, 195, col. 1 top, in support of the firmly established proposition that *the conformity rule must "give way whenever to adopt the State practice would be inconsistent with the terms, defeat the purpose or impair the effect of any legislation of Congress"*.

The *Chappell* case has been later cited with approval by this Court in *Metropolitan R. Co.* v. *MacFarland*, 49 L. Ed. 219; *Hills & Co.* v. *Hoover*, 55 L. Ed. 485, 488, col. 1 bot., where it was said that it is enough if the Federal courts, "in adjudicating the rights of parties, comply with the State practice *as near as may be*"; and more recently, *United States* v. *Miller*, 87 L. Ed. at p. 346, footnote 25, again approvingly cites the *Chappell* case, 40 L. Ed. at its pp. 510, 514-515.

B. There is no statutory conflict.

The foregoing decisions of our highest Court lead to the inescapable conclusion that the *Federal statute as to conformance as near as may be* with local practice in condemnation cases (Section 258, 40 U. S. C. A.), and Section 770, 28 U. S. C. A., *requiring fact-issues in law cases to be tried by jury in Federal district courts, are not conflicting enactments.* (Cf. Supp. R., p. 12 bot.; *Iriarte* v. *United States*, 157 Fed. (2d) at p. 108, col. 2 mid.).

Such statutes not being irreconcilable, as held by this Supreme Court in the various cases above referred to, must be given effect fully, since repeals by implication are

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is that *the trial of issues of fact in actions at law*, both *in the district court and in the circuit court, 'shall be by jury', by which is evidently meant a trial by an ordinary jury at the bar of the court.* U. S. Rev. Stat. §§566, 648. Congress has not itself provided any peculiar mode of trial in proceedings for the condemnation of lands for public uses. The direction in the act of 1888, Chap. 728, § 2, *that such proceedings shall conform, 'as near as may be'*, to those 'in the courts of record of *the state', is not to be construed as creating an exception to the general rule of trial by an ordinary jury in a court of record.* . . ."

not favored, much less when the fundamental right of trial by jury is involved. *In Posadas* v. *National City Bank,* 80 L. Ed. 351, 355, 356, this Court warned that:

> "Repeals by implication are not favored; and where there are two acts upon the same subject, *effect should be given to both if possible.* A statute is impliedly repealed by a later one to the extent to which their provisions are in irreconcilable conflict, or if the later act covers the whole subject of the earlier one and is clearly intended as a substitute; but in either case the intention of the legislature to repeal must be clear and manifest, otherwise *the later act is generally to be construed as the continuation of, and not a substitute for, the first act,* and will continue to speak so far as the two acts are the same, from the time of the first enactment. The mere fact that a later statute covers the whole subject of an earlier one and embraces new provisions does not demonstrate an intention to substitute the later act for the earlier, so as to effect an implied repeal. . . Even in the face of a repealing clause, circumstances may justify the conclusion that a later act repealing provisions of an earlier one is a continuation, rather than an abrogation and re-enactment, of the earlier act."
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> *Posadas* v. *National City Bank,* 80 L. Ed. 351, col. 2, 355-356.[3]

Point II

There is no Congressional authority for the taking in this case. The statute invoked by condemnor authorizes expropriation of lands "needed for the site, location, construction or prosecution of works for fortifications, coast defenses, military training camps. . . ." Petitioners' lands were taken for the avowed purpose of establishing "a terminal and dock to serve the Puerto Rican General Depot".

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[3] See also *United States* v. *Jackson,* 82 L. Ed. 438, syll. 2; *United States* v. *Borden Co.,* 308 U. S. 188, 84 L. Ed. 181, syll. 8-9; *West India Oil Co.* v. *Domenech,* 311 U. S. 20, 85 L. Ed. 16, syll. 4; and *Bartlett* v. *United States,* 166 F. (2d) 921, syll. 15-16.

The record is barren of any references or evidence of works in progress for fortifications, coast defenses, or training camps on or around the lands condemned. Under such circumstances, it is obvious that Congress has in no way provided that lands may be taken lawfully either for the site or for the prosecution of works for docks or depots.

Petitioners did not and could not, at the first trial of this case, assail condemnor's alleged right to expropriate the lands in suit, due to a previous Circuit Court of Appeals' decision that a preliminary judgment in condemnation vested title and possession in the United States with a "final and immediate effect on property rights", and that such judgment should be separately reviewed without awaiting the Court's valuation. *Puerto Rico Ry. Lt. & P. Co.* v. *United States* (C. C. A., 1st), 131 F. (2d) 491, 494. The preliminary judgment on the declaration of taking and order for surrender of possession by the landowners had been entered on May 31, 1941 (R. 18-21). Petitioners did not appeal from that first *ex parte* judgment of condemnation because of their belief in its interlocutory character. *But it was not until February 26, 1945, that this Court overruled the holding as to finality of preliminary judgments of title in condemnation cases,* as held in the *Puerto Rico Lt. & P. Co.* case, *supra* and in other similar decisions. This Court, in short, held that a final judgment in the main condemnation suit, including the amount of just compensation, as well as the right to take, was necessary to complete the proceeding. *Catlin* v. *United States,* 89 L. Ed. 912, 921, col. 1 bot.

In any event, the jurisdictional question as to lack of authority to take was expressly saved and argued in behalf of petitioners, as per stipulation filed by the parties in the trial court (Supp. R., pp. 20-21). In the judgment of the District Court it is stated, however, "that the United States of America had lawful authority to condemn"

(Supp. R., pp. 24, 26). The Circuit Court of Appeals also said: "Congress must have intended to authorized the taking of whatever lands the Secretary of War might validly determine to be necessary for use in connection with land devoted directly and immediately to fortifications, coast defenses or military training camps." *Iriarte* v. *United States,* 157 F. (2d) 107, col. 2 bot. (Supp. R., 10 bot.).[4]

It will be observed that the record even lacks basis to support the courts' foregoing conclusions. The trial judge himself wanted *"to have light on"* the question as to "why did the Army want this site?" (R. 310 mid.).

The petition and declaration of taking expressly aver that the use for which the subject lands were intended was "in connection with the establishment of a terminal and dock to serve the Puerto Rican General Depot" (R. 2), i.e., for the construction of a terminal and dock to carry on and prosecute services for the Puerto Rican General Depot. *The dock and depot clearly are not constructions* for either offensive or protective purposes, *such as fortifications, coast defenses or military training camps would be.* They were really during the War, inviting objectives for enemy attacks. As testified by J. A. Noell, one of petitioner's witnesses, "If anything is bombed here (San Juan) the first thing would be the docks" (R. 302 top).[5]

Petitioners challenge the taking's validity for non-conformity with the purposes or uses specifically set out in

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[4] Defendants did not then attempt a review thereof by certiorari because of the interlocutory nature of said holding, as it appears from *footnote 1* of the Petition for Writ of Certiorari.

[5] Neither the contention that in an insular possession such as Puerto Rico nothing could be more necessary for the "prosecution of works for *fortifications, coast defenses, or military training camps*" than a *dock* at which personnel may embark or debark, etc., would be valid, since, the geographic position of Puerto Rico does not make a fortification, coast defense or military training camp out of *"a terminal and dock to serve to Puerto Rican General Depot."*

the *War Purposes Act of 1917*, 50 U. S. C. A. § 171, on which condemnor's petition is based (R. 2, 8).[6]

Those purposes restrict the acquirement by condemnation to any lands "needed for the site, location, construction or *prosecution of works for fortifications, coast defenses, military training camps . . .*" See *Catlin* v. *United States*, 89 L. Ed. 912, 914, footnote 1. The words "*prosecute*" and "*prosecution*", as used in the statute, have this meaning: "*Prosecute* . . . to continue endeavors to accomplish or *complete* . . . as, to prosecute an undertaking; . . ." "*Prosecution*— . . . the carrying on *or following up of any matter in hand;* . . . the prosecution of war . . .; *the prosecution of a work* . . ." *The Century Dictionary & Cyclopedia*, Vol. VI. p. 4786.

But the record plainly exhibits that such is not the use for which the lands were taken or to which they have been devoted. Nor does it appear that there were any works *in progress for fortifications, coast defenses or training camps which on or about May 31, 1941, were in need of any land for their prosecution or terminaton.* Under these circumstances, all that can be determined is that *Congress has in no way provided that lands may be taken either for the site or for the prosecution of works for docks or depots.* Fortifications, coast defenses and training camps are the only military installations enumerated or specified by the condemnation statute in question. *War Purposes Act of 1917*, 50 U. S. C. A. § 171.

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[6] It is to be noted that neither the *necessity* as determined by the Secretary of War nor even whether the Government's undertaking is a *public use* are involved in the jurisdictional question raised. That objection would plainly misconceive appellants' point regarding condemnor's lack of power to expropriate the subject lands in this case. As above stated, appellants challenge the taking's validity for non-conformity with the purposes or uses specifically set forth in the *War Purposes Act of 1917*, 50 USCA § 171.

> Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circumspection in order to avoid usurpation of the latter. Monson *v.* Chester, 22 Pick. 385, 387. It is not enough merely that hard and objectionable or absurd consequences, which probably were not within the contemplation of the framers, are produced by an act of legislation. Laws enacted with good intention, when put to the test, frequently, and to the surprise of the law maker himself, turn out to be mischievous, absurd or otherwise objectionable. *But in such case the remedy lies with the law making authority, and not with the courts . . .*"
>
> *Crooks* v. *Harrelson,* 75 L. Ed. at p. 175 mid.; *Walling* v. *General Industries Co.,* 155 F. (2d) 711, syllabus 5.

It is not to be overlooked that the point now considered concerns condemnation enactments. These are generally construed strictly and, in so doing, courts do "not have to look beyond the text of the statute". *Northern Mining and Trading Co.* v. *Alaska Gold Recovery Co.,* 20 F. (2d) 5, 7-8; *United States* v. *West Virginia Power Co.,* 33 F. Supp. 756, 760; *Puerto Rico Ry. Light and Power Co.* v. *United States,* 131 F. (2d) 492, 499.[7] See also 29 C. J. S. § 215,

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[7] *Northern Mining and Trading Co.* v. *Alaska Gold Recovery Co.,* 20 F. (2d) 5, syll. 4, and at pp. 7-8: *"It is quite manifest to us that these statutes do not authorize the taking of private property for any such use as is here contemplated. . . .* In this case the main purpose of the taking as appears from the allegations of the amended complaint and more particularly from the findings of the court, is to obtain a site for plant and equipment to operate the mine, which cannot be maintained on the Comber's Right claim because of the periodical inflow of sea water. *Whether the Legislature could authorize the taking of private property*

pp. 1141, 1142 (Eminent Domain). It is to be borne in mind that the taking of private property for public use is in derogation of common right and that *authority so to do must be clearly expressed. Smith & Son* v. *Taylor,* 72 L. Ed. 523, syllabus 3, p. 527, col. 2 top; *Cincinnati* v. *Vester,* 74 L. Ed. 950, syll. 6, p. 956, col. 1 mid.; *United States* v. *2.4 Acres of Land, etc.,* 138 F. (2d) 296, syll. 7, p. 298, col. 2 top.

And in *Catlin* v. *United States,* 89 L. Ed. 912, 920, col. 2 mid., this Court warns that if condemnation is not for a purpose *manifestly* authorized by law, the lack of power to take renders the expropriation illegal and any compensation awarded cannot be the just compensation guaranteed by the 5th Amendment.

Conclusion

The decision of the Circuit Court of Appeals was wrong and should be reversed. And in view of its importance and seriousness, the questions here presented should be settled by this Court.

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for any such purposes we need not inquire because it has not done so. Such statutes are universally construed strictly. . . ."

United States v. *West Virginia Power Co.,* 33 F. Supp. 756, 760, col. 1, holds that if federal officers are authorized to institute condemnation proceedings for appropriation of land for certain purposes, *their authority fails if they attempt to appropriate the land taken to any other purpose,* and there is a change of purpose when the purpose is stated to be something less than that authorized.

In *Puerto Rico Ry. Light and Power Co.* v. *United States,* 131 F. (2d) 492, syll. 8, p. 499, col. 1, this Court of Appeals held that a certain federal statute permitting condemnation of improved or unimproved lands or interests therein in order to afford the public works necessary to health, safety and welfare of defense workers, *did not authorize United States to condemn and take over as a going concern all the real and personal properties of* a privately owned public utility; *and that the court "did not have to look beyond the text of the statute."*

It is, therefore, earnestly requested that the writ of certiorari be granted.

JOSE A. POVENTUD,
F. FERNANDEZ CUYAR,
Attorneys for Petitioners.
By F. FERNANDEZ CUYAR.

CELESTINO IRIARTE, JR.,
H. GONZALEZ BLANES,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 94

CELESTINO IRIARTE, JR., ET AL., *Petitioners*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Circuit Court of Appeals for the First Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinions of the district court upon the original trial (R. 315-318) and upon further proceedings after remand (R. pt. II, 23-26)[1] are not reported. The opinion of the circuit court of appeals upon the first appeal (R. pt. II, 7-19) is reported at 157 F. 2d 105. Its opinion upon the second appeal (R. pt. II, 33-40) is reported at 166 F. 2d 800.

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[1] The supplemental record of proceedings after the first appeal will be hereinafter referred to as "part II."

JURISDICTION

The judgment of the circuit court of appeals was entered March 11, 1948 (R. pt. II, 40). The petition for a writ of certiorari was filed on June 11, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

1. Whether the condemnation of land for the purpose of establishing a terminal and dock to serve a military establishment was authorized by the War Purposes Act of July 2, 1917.

2. Whether the courts below correctly denied petitioners' request for a jury trial.

STATUTES INVOLVED

The relevant portion of the War Purposes Act of July 2, 1917, c. 35, 40 Stat. 241, as amended (50 U. S. C. 171), provides:

> The Secretary of War may cause proceedings to be instituted in the name of the United States, in any court having jurisdiction of such proceedings for the acquirement by condemnation of any land, temporary use thereof or other interest therein, or right pertaining thereto, needed for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps, and for the construction and operation of plants

> for the production of nitrate and other compounds and the manufacture of explosives and other munitions of war and for the development and transmission of power for the operations of such plants; such proceedings to be prosecuted in accordance with the laws relating to suits for the condemnation of property of the States wherein the proceedings may be instituted * * *.

The relevant portions of the General Condemnation Act of August 1, 1888, c. 728, 25 Stat. 357 (40 U. S. C. 258 and 28 U. S. C. 770), are quoted in the Argument, *infra*, p. 7.

STATEMENT

The proceedings below, so far as here material, may be summarized as follows:

On May 31, 1941, the United States filed in the United States District Court for Puerto Rico its petition for condemnation (R. 8-16) and declaration of taking (R. 1-8) of the land here involved, and deposited in court $7,311.60 as estimated just compensation pursuant to the Declaration of Taking Act of February 26, 1931, c. 307, 46 Stat. 1421, 40 U. S. C. 258a. On the same day the court entered judgment on the declaration of taking and an order for immediate possession (R. 18-21). The petition alleged that the taking was for "military purposes" (R. 9) and the declaration of taking stated (R. 2):

> The public uses for which said lands are taken are as follows: The said lands are necessary adequately to provide for storage and terminal facilities at an army base. The said lands have been selected by me for acquisition by the United States for use in connection with the establishment of a terminal and dock to serve the Puerto Rican General Depot, and for such other uses as may be authorized by Congress or by Executive Order, and are required for immediate use.

Petitioners filed their original answer on January 19, 1943, and amended answer on January 28, 1943 (R. 339). The amended answer did not challenge the right of the Government to condemn. It simply alleged that petitioners were co-owners of the land and that just compensation would be not less than $200,430, and demanded a jury trial (R. 25-27). At the commencement of the trial on January 28, 1943, the request for a jury was considered and denied (R. 27-31). On March 20, 1945, the court filed findings of fact and judgment fixing compensation at $33,297 (R. 311-315). Both parties appealed from this judgment (R. 330, 346).

On September 20, 1946, the circuit court of appeals reversed the judgment. It first held that the taking was authorized by the War Purposes Act of 1917 (R. pt. II, 9-10). It stated that petitioners' contention was "so lacking in merit" that it did not

consider possible impediments to considering the contention due to failure of the petitioners to raise it in the trial court (R. pt. II, 10). The appellate court next held that the trial court had correctly denied petitioners' request for a jury trial (R. pt. II, 11-12). However, the judgment was reversed upon the appeal of the United States because of error as to valuation (R. pt. II, 14-19). Upon remand, the case was re-submitted to the court upon the record on the first appeal and, on March 14, 1947, a new judgment was entered fixing compensation in the amount of $45,000 (R. pt. II, 20-26). Both parties again appealed (R. pt. II, 26-29) and on March 11, 1948, the circuit court of appeals affirmed the judgment (R. pt. II, 33-40). Petitioners' contentions were disposed of on the ground that they all had been considered on the first appeal and the court saw no reason to change the views expressed in the first opinion (R. pt. II, 36).

ARGUMENT

1. The War Purposes Act of 1917 authorized the acquisition of lands needed "for the site, location, construction, or prosecution of works for fortifications, coast defenses, military training camps." Petitioners' lands were needed "to provide for storage and terminal facilities at an army base" (R. 2). In an insular possession such as Puerto Rico nothing could be more necessary for the listed military purposes than a dock at which personnel

may embark or debark and necessary supplies, equipment and materials may be landed or stored. Petitioners apparently contend (Pet. 16-17) that the 1917 Act is limited to the "site" or "location" of fortifications, coast defenses or military camps. In so doing, they ignore the other terms of the Act authorizing the acquisition of land "needed for the * * * construction or prosecution of works for" such military installations. Certainly, as the court below stated (R. pt. II, 10) Congress, by this language, intended to make such installations effective by providing access thereto and by providing lands needed for storage of ammunition and other supplies and equipment. Cf. *City of Oakland* v. *United States*, 124 F. 2d 959, 964 (C. C. A. 9), certiorari denied, 316 U. S. 679. The furnishing of access and storage facilities was incidental to establishing the army base. Cf. *Polson Logging Company* v. *United States*, 160 F. 2d 712 (C. C. A. 9).[2]

2. The Seventh Amendment did no more than preserve the right to jury trial as it existed at common law. *Baltimore and Carolina Line* v. *Redman*,

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[2] Since it is clear that the taking was authorized by the War Purposes Act of 1917 it is unnecessary to elaborate on the reasons why petitioners were not entitled to raise this question for the first time on appeal. Cf. *United States* v. *Nudelman*, 104 F. 2d 549 (C. C. A. 7), certiorari denied, 308 U. S. 589. It is likewise unnecessary to demonstrate that, in any event, the taking was authorized by the Act of July 2, 1940, c. 508, 54 Stat. 712, 50 U. S. C. App. 1171.

295 U. S. 654, 657. At common law there was no right to trial by jury in eminent domain proceedings (*Crane* v. *Hahlo*, 258 U. S. 142, 147), hence there is no constitutional requirement that such cases be tried by a jury. *Bauman* v. *Ross*, 167 U. S. 548, 593. Thus, the problem presented here is simply one of statutory construction.

Petitioners rely upon the provision of 28 U. S. C. 770 that "trial of issues of fact in the district courts, in all causes" except equity, admiralty and maritime jurisdiction and bankruptcy, "shall be by jury." This is the general provision originally adopted in the Judiciary Act of 1789, c. 20, sec. 12, 1 Stat. 79. However, the General Condemnation Act of August 1, 1888, c. 728, 25 Stat. 357 (40 U. S. C. 258), provides that the procedure in eminent domain proceedings shall "conform, as near as may be, to the practice, pleadings, forms and proceedings" of the state courts, and the War Purposes Act of 1917 contains similar provisions.[3] The law of Puerto Rico does not provide for jury trial in condemnation proceedings (R. pt. II, 11; Puerto Rico Code of Civil Procedure App. pp. 301-305). As the court below held (R. pt. II, 12), well settled principles of statutory construction lead to the conclusion that the conformity provision is controlling. First, because it is a specific provision as to the procedure to be followed in condemnation cases

[3] Puerto Rico is a "state" within the meaning of such provisions. *Perez* v. *Fernandez*, 202 U. S. 80.

rather than a general provision as to trial of civil causes. Second, because the conformity provision, which was the first statute expressly vesting the district courts with jurisdiction in condemnation causes, was enacted almost a hundred years after the provision for jury trial in civil causes became law. Shortly after the 1888 Act was passed, this Court in *Luxton* v. *North River Bridge Co.*, 147 U. S. 337, approved the conformance to state law providing for determination of compensation by commissioners with such modifications of the literal language of the local statute as may be necessary to fit the procedure of the federal court. And, since that time, it has been the universal practice of federal courts to follow the local method of trial, whether it be by commissioners, by the court, or by a jury, with such procedural modifications as may be required. See e.g. *Mallette* v. *United States*, 137 F. 2d 95 (C. C. A. 8); *United States* v. *Kennesaw Mountain Battlefield Ass'n*, 99 F. 2d 830, 834 (C. C. A. 5); *United States* v. *243.22 Acres of Land*, 129 F. 2d 678 (C. C. A. 2); *United States* v. *Lambert*, 146 F. 2d 469 (C. C. A. 2).

The decision in *Chappell* v. *United States*, 160 U. S. 499, relied upon by petitioners (Pet. 12-13) does not indicate that this understanding of many years' duration is erroneous. It has always been recognized that the local procedure need not be followed when the result would be to encumber the administration of justice. See e.g. *Forbes* v.

United States, 268 Fed. 273 (C. C. A. 5). Such was the situation in the *Chappell* case, where local law provided for an initial appraisal by a "jury of inquest" proceeding out of the presence of the court and allowed an appeal to the court sitting with a common law jury. The federal court conformed to local law in other respects but tried the question of value in the first instance by a jury before the bar of the court. This Court rejected the landowner's contention that he was entitled to a second jury trial in the court. Thus, the decision was simply that conformity to local practice should not go so far as to dispense with the presence of the judge at a jury trial or to grant two jury trials in the same court. The case did not hold that a jury trial was the exclusive method of determining compensation in federal condemnation cases. This is made clear by the fact that the *Chappell* opinion relied upon *Luxton* v. *North River Bridge Co.,* 147 U. S. 337. Moreover, in *Traction Company* v. *Mining Company,* 196 U. S. 239 (See also *Perez* v. *Fernandez,* 202 U. S. 80, 99), this Court, without mentioning the *Chappell* case, ruled that local procedure rather than the jury trial provision of the Revised Statutes governed the trial of condemnation proceedings which were removed to the fedral court because of diversity of citizenship.

CONCLUSION

The decision below is correct and presents no conflict. The petition for certiorari should therefore be denied.

Respectfully submitted,

PHILIP B. PERLMAN,
Solicitor General.

A. DEVITT VANECH,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

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In the Supreme Court of the United States

OCTOBER TERM, 1948

No. 94

CELESTINO IRIARTE, JR., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

SUPPLEMENTAL MEMORANDUM FOR THE UNITED STATES

The attention of the Court is invited to the fact that the statutory provision relied on by petitioners as entitling them to a jury trial, 28 U. S. C. 770, R. S. secs. 566, 648, has been repealed, effective September 1, 1948. Pub. Law No. 773, 80th Cong., 2d sess. (June 25, 1948), sec. 39. The portions of those sections relating to jury trial in cases of admiralty and maritime jurisdiction are now embodied in 28 U. S. C. 1873. The Reviser's note to that section states, "The first sentence of section 770 of title 28, U. S. C., 1940 ed., providing generally for the right of jury trials in district courts, was omitted as covered by rule 38 of the Federal Rules of Civil Procedure." H. Rep. No. 308, 80th

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Cong., 1st sess. (1947) p. A159; U. S. C. Congressional Service, 80th Cong., 2d sess., p. 1884. The Federal Rules of Civil Procedure are of course inapplicable to trials of condemnation cases. Rule 81 (a) (7).

Respectfully submitted.

PHILIP B. PERLMAN,
Solicitor General.

A. DEVITT VANECH,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

OCTOBER 1948.

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